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CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SIXTO Q. NAVARETTE,  
BOP #20463-298

Plaintiff,

vs.

PIONEER MEDICAL CENTER; U.S.  
MARSHAL'S SERVICE; FEDERAL  
BUREAU OF PRISON; DR. MARK  
WHITE,

Defendants.

Civil No. 12cv0629 WQH (DHB)

**ORDER:**

**(1) GRANTING PLAINTIFF'S  
MOTION TO PROCEED IN  
FORMA PAUPERIS AND  
GARNISHING BALANCE FROM  
INMATE'S TRUST ACCOUNT  
PURSUANT TO 28 U.S.C. § 1915(a);  
and**

**(2) SUA SPONTE DISMISSING  
COMPLAINT PURSUANT TO  
28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

Plaintiff, Sixto Q. Navarette, a federal inmate currently incarcerated at Victorville Federal Corrections Institution located in Adelanto, California, has filed a civil rights action pursuant to 42 U.S.C. § 1983. In addition, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [ECF No. 5].

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**I. MOTION TO PROCEED IFP**

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2).

The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C. § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement shows that he has insufficient funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4). Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [ECF No. 5] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fee mandated shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

**II. SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) and § 1915A**

**A. Standard**

The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program," "as soon as practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

1 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
2 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is  
3 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,  
4 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing  
5 an IFP or prisoner's suit make and rule on its own motion to dismiss before effecting service of  
6 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection  
7 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint  
8 that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)  
9 (discussing 28 U.S.C. § 1915A).

10 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
11 allegations of material fact and must construe those facts in the light most favorable to the  
12 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
13 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s  
14 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,  
15 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*  
16 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

### 17 **B. Claims brought pursuant to § 1983**

18 In his Complaint, Plaintiff alleges that on February 2, 2010, he was “taken to Pioneers  
19 Memorial Hospital” where he was “admitted to the emergency department.” (Compl. at 2.)  
20 Plaintiff claims that he underwent an operation that was not “performed correctly” by Defendant  
21 White. (*Id.*) Although not entirely clear, it appears that Plaintiff was not incarcerated at the time  
22 these events arose.

23 Plaintiff seeks to hold Defendants Pioneers Memorial Hospital and Defendant White  
24 liable pursuant to 42 U.S.C. § 1983. Section 1983 imposes two essential proof requirements  
25 upon a claimant: (1) that a person acting under color of state law committed the conduct at  
26 issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity  
27 protected by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Parratt v.*  
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1 *Taylor*, 451 U.S. 527, 535 (1981), overruled on other grounds by *Daniels v. Williams*, 474 U.S.  
2 327, 328 (1986); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

3 To the extent Plaintiff seeks to hold either of these Defendants liable pursuant to § 1983,  
4 his Complaint fails to allege any facts sufficient to show that a private entity or their employee  
5 acted “under color of state law.” *Franklin*, 312 F.3d at 444; *see also Kirtley v. Rainey*, 326 F.3d  
6 1088, 1092 (9th Cir. 2003) (“While generally not applicable to private parties, a § 1983 action  
7 can lie against a private party” only if he is alleged to be “a willful participant in joint action with  
8 the State or its agents.”) (citation and quotation marks omitted). If Plaintiff were incarcerated  
9 at the time he was admitted to Pioneers Memorial Hospital, he may be able to pursue a § 1983  
10 claim against Defendant White but he will have to clarify his status in an Amended Complaint.<sup>1</sup>

### 11 C. Bivens Action

12 In addition, the Court notes that while Plaintiff purportedly brings this action under  
13 § 1983, the Court will liberally construe some of his claims to arise under *Bivens v. Six Unknown*  
14 *Named Fed. Narcotics Agents*, 403 U.S. 388 (1971) because Plaintiff claims violations of his  
15 civil rights by a federal actors. *Bivens* established that “compensable injury to a constitutionally  
16 protected interest [by federal officials alleged to have acted under color of federal law] could be  
17 vindicated by a suit for damages invoking the general federal question jurisdiction of the federal  
18 courts [pursuant to 28 U.S.C. § 1331].” *Butz v. Economou*, 438 U.S. 478, 486 (1978). “Actions  
19 under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under  
20 § 1983 by a federal actor under *Bivens*.” *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991).

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24 <sup>1</sup> Based on the current allegations, even if Plaintiff were incarcerated when he underwent surgery  
25 by Defendant White, his allegations fail to rise to the level of an Eighth Amendment violation.  
26 Plaintiff’s allegations sound in negligence. In general, deliberate indifference may be shown when  
27 prison officials deny, delay, or intentionally interfere with a prescribed course of medical treatment, or  
28 it may be shown by the way in which prison medical officials provide necessary care. *Hutchinson v.*  
*United States*, 838 F.2d 390, 393-94 (9th Cir. 1988). Before it can be said that a inmate’s civil rights  
have been abridged with regard to medical care, however, “the indifference to his medical needs must  
be substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause  
of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (citing *Estelle v.*  
*Gamble*, 429 U.S. 97, 105 - 106 (1976). *See also Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir.  
2004).

1 To state a private cause of action under *Bivens*, Plaintiff must allege: (1) that a right  
2 secured by the Constitution of the United States was violated, and (2) that the violation was  
3 committed by a federal actor. *Id.*; *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624  
4 (9th Cir. 1988). *Bivens* provides that “federal courts have the inherent authority to award  
5 damages against federal officials to compensate plaintiffs for violations of their constitutional  
6 rights.” *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000).  
7 However, a *Bivens* action may only be brought against the responsible federal official in his or  
8 her individual capacity. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1988). In his  
9 Complaint, Plaintiff seeks to sue the United States Marshal Service and the Federal Bureau of  
10 Prison which are agencies of the government. (See Compl. at 1.) However, *Bivens* does not  
11 authorize a suit against the government or its agencies for monetary relief. *FDIC v. Meyer*, 510  
12 U.S. 471, 486 (1994); *Thomas-Lazear v. FBI*, 851 F.2d 1202, 1207 (9th Cir. 1988); *Daly-*  
13 *Murphy*, 837 F.2d at 355. Accordingly, the Court must DISMISS the claims against the United  
14 States Marshal Service and the Federal Bureau of Prison for failing to state a claim upon which  
15 relief may be granted.

16 Plaintiff raises allegations relating to the time that he spent incarcerated at a private  
17 facility, the Western Regional Detention Facility, and claims that he suffered from inadequate  
18 medical care. (See Compl at 5-6.) However, *Bivens* does not provide a remedy for alleged  
19 wrongs committed by a private entity alleged to have denied Plaintiff’s constitutional rights  
20 under color of federal law. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 69 (2001)  
21 (“[T]he purpose of *Bivens* is to deter the officer,’ not the agency.”) (quoting *Meyer*, 510 U.S.  
22 at 485); *Malesko*, 534 U.S. at 66 n.2 (holding that *Meyer* “forecloses the extension of *Bivens* to  
23 private entities.”). Accordingly, Plaintiff cannot bring claims of civil rights violations against  
24 the Western Regional Detention Facility.

25 In addition, the Supreme Court recently held that a prisoner cannot bring a *Bivens* action  
26 against an employee of a private entity for damages pursuant to alleged Eighth Amendment  
27 violations. See *Minnecci v. Pollard*, 132 S.Ct. 617, 626 (2012).

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1 In *Minneeci*, the Supreme Court held that

2 [W]here “a federal prisoner seeks damages from privately employed personnel working  
3 at a privately operated federal prison, where the conduct allegedly amounts to a violation  
4 of the Eighth Amendment, and where that conduct is a kind that typically falls within the  
5 scope of traditional state tort law (such as the conduct involving improper medical care  
6 at issue here), the prisoner must seek a remedy under state tort law. We cannot imply a  
7 *Bivens* remedy in such a case.”

8 *Id.*

9 Accordingly, Plaintiff’s entire Complaint must be dismissed for failing to state a claim  
10 upon which section 1983 relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii) & 1915A(b).

### 11 **III. CONCLUSION AND ORDER**

12 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

13 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 5] is  
14 **GRANTED**.

15 2. The Warden, or his designee, shall collect from Plaintiff’s prison trust account the  
16 \$350 balance of the filing fee owed in this case by collecting monthly payments from the account  
17 in an amount equal to twenty percent (20%) of the preceding month’s income and forward  
18 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in  
19 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY  
20 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

21 3. The Clerk of the Court is directed to serve a copy of this Order on Warden,  
22 Victorville Federal Corrections Institution, P.O. Box 5400, Adelanto, California 92301.

23 **IT IS FURTHER ORDERED** that:


24 4. Plaintiff’s Complaint is **DISMISSED** without prejudice for failing to state a claim  
25 upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b).  
26 However, Plaintiff is further **GRANTED** forty five (45) days leave from the date this Order is  
27 filed in which to file a First Amended Complaint which cures all the deficiencies of pleading  
28 noted above. Plaintiff’s Amended Complaint must be complete in itself without reference to  
his previous pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not named and all claims not re-

1 alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565,  
2 567 (9th Cir. 1987).

3 5. The Clerk of Court is directed to mail a court approved form civil rights complaint  
4 to Plaintiff.

5 **IT IS SO ORDERED.**

6 DATED: 7/10/12

  
7 **HON. WILLIAM O. HAYES**  
8 United States District Judge  
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